

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

NEIL MCGOWAN,  
Plaintiff,

No. C 23-cv-04291-WHA

v.

**ORDER TO COMPEL  
ARBITRATION**

NETAPP, INC., A DELAWARE  
CORPORATION, HENRI RICHARD,  
ELIZABETH O'CALLAHAN, DEBRA  
MCCOWAN, CESAR CERUNDA,  
RICHARD SCURFIELD, MAXWELL  
LONG, ROSALIND HILL, and DOES 1  
through 50,

Defendants.

---

In this RICO and FEHA action, this order **GRANTS** defendants' motion to compel arbitration. The 2023 arbitration agreement delegates this matter to an arbitrator. This order hereby **STAYS** this action pending arbitration.

Plaintiff Neil McGowan was a Vice President and General Manager of Sales for defendant NetApp, Inc., a company which provides data and cloud-storage services and management. In this case, plaintiff is suing for his commissions set by an annual agreement which is referred to by counsel as a goal sheet and an incentive commission plan. Plaintiff is expressly suing under this contract. It is this very contract sued on that has an arbitration agreement.

1           Aside from fiscal year 2019 (for which plaintiff signed the goal sheet by hand), plaintiff  
2           used his unique username and password each year to access the goal sheet and compensation  
3           plan and clicked on a screen button that said “accept.” Immediately above the “accept”  
4           button, the screen read, “I have read, understand, and agree to the Terms and Conditions.”  
5           The phrase ‘terms and conditions’ was in blue and could be clicked to link the terms and  
6           conditions of that year’s compensation plan. On page 24 of 34 of the 2023 fiscal year  
7           compensation plan agreement resided an arbitration agreement (Dkt. No. 15-1 Exh. I at 3).  
8           This order holds that the arbitration agreement was part of the terms and conditions that he  
9           accepted by clicking on “accept.”  
10          

11          Plaintiff contends that there should have been a warning above the accept button stating  
12          that there was an arbitration agreement lurking in the terms and conditions. He cites *Esparza*  
13          *v. Sand & Sea* 2 Cal.App.5th 781, 790-791 (2016) which seems to make such a requirement  
14          under California state law. That decision, however, had an employee sign a policy  
15          acknowledgement for an employee handbook that specifically said it was not a contract. *Id.* at  
16          784. Therefore, the appellate court held, in order to elevate the arbitration clause found within  
17          the handbook to a contract, the clause had to be called out specifically and conspicuously. *Id.*  
18          at 791. Here, we do not have that wrinkle. The goal sheet (along with the terms and  
19          conditions of the compensation plan) purport to be a contract, unlike the *Esparza* decision.  
20          

21          Accordingly, this order holds that the parties entered into an arbitration agreement. The  
22          arbitration agreement delegates to the arbitrator all issues as to arbitrability, validity, and scope  
23          per the institutional JAMS rules which have been incorporated into the arbitration agreement.  
24          Therefore, all further issues are for the arbitrator to decide, including the issue of an alleged  
25          violation of Labor Code Section 2751.  
26          

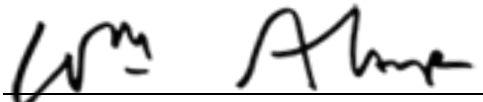
27          Lastly, this order finds that the arbitration agreement can be enforced by the  
28          nonsignatory defendants. In California, a nonsignatory to an arbitration agreement may

1 invoke arbitration against a party if a preexisting confidential relationship, such as an agency  
2 relationship between the nonsignatory and one of the parties to the arbitration agreement,  
3 makes it equitable to impose the duty to arbitrate upon the nonsignatory. *Murphy v. DirecTV*,  
4 724 F.3d 1218, 1232 (9th Cir. 2013). As employees of NetApp, the named, nonsignatory  
5 defendants acted on NetApp's behalf while they acted in their official capacities as executives  
6 of the company. Therefore, the named, nonsignatory defendants are agents of NetApp and are  
7 permitted to enforce the arbitration agreement.  
8

9 The case is hereby **STAYED** to permit arbitration to proceed. The parties will report back  
10 on **July 11, 2024, at 8:00 am** to advise whether arbitration is complete. If defendant drags its  
11 feet in proceeding with the arbitration, the stay may be lifted.  
12

13 **IT IS SO ORDERED.**  
14  
15

16 Dated: January 26, 2024.

17   
18 WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28